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Supreme Court Of The United States

OCTOBER TERM, 1975

No. 75-1726

TERRELL DON HUTTO, COMMISSIONER,
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

vs.

ANDREW JACKSON ROSS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner Terrell Don Hutto prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 16, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The opinion of the District Court for the Western District of Arkansas is reported at 394 F. Supp. 1219 (1975). The opinion of the Arkansas Supreme Court is reported at 514 S.W.2d 409 (Ark. 1974).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 16, 1976. A timely Motion

for a rehearing *en banc* was denied on April 5, 1976, and this petition for certiorari was filed within ninety days. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

WHETHER A STATEMENT MADE SUBSEQUENT TO AN AGREED UPON PLEA BARGAIN THE CONTINUED VALIDITY OF WHICH IS NOT CONDITIONED UPON THE GIVING OF THE STATEMENT, IS INVOLUNTARY AND INADMISSIBLE UNDER THE TOTALITY OF THE CIRCUMSTANCES?

CONSTITUTIONAL PROVISIONS

I

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

II

ARTICLE I OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent, Andrew Jackson Ross, while Treasurer of Pope County, Arkansas, was charged on March 14, 1972, with 86 counts of converting, using and embezzling public funds.

The respondent, his counsel, and the prosecuting attorney entered into plea negotiations and an agreement was reached in September, 1972. The respondent agreed to enter a plea of guilty in return for the prosecutor's recommending a fifteen year sentence with ten years suspended. At least a week and maybe two weeks after the agreement was reached the prosecuting attorney asked respondent's counsel if the respondent would give a statement concerning the crimes. (Federal Transcript 20. References to the federal court transcript will be shown as F.T. and to the state court trial transcript as S.T.)

Prior to giving the statement the respondent was informed that he could refuse to make the statement and still receive the benefit of the plea bargain. (F.T. 30) The respondent was given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), prior to making the statement (F.T. 37-38) and his attorney was present during the giving of the statement. (S.T. 535) Subsequently, the respondent withdrew from the plea bargain, changed attorneys, and demanded a jury trial. After a trial by jury

the appellant was found guilty and the jury recommended a sentence of twenty-one years.

The respondent appealed his conviction to the Arkansas Supreme Court and the conviction was affirmed. *Ross v. State,* 257 Ark. 44, 514 S.W.2d 409 (1974). A petition for a writ of certiorari was denied by this Court on April 21, 1975. *Ross v. Arkansas,* No. 74-1087.

The respondent next filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Arkansas, Fort Smith Division, again challenging the admissibility of his confession. An evidentiary hearing was held on May 15, 1975, at which the respondent did not testify. On May 23, 1975, the Honorable Paul X. Williams denied the petition. *Mobley ex rel. Ross v. Meek,* 394 F. Supp. 1219 (1975).

The United States Court of Appeals for the Eighth Circuit granted the respondent's application for a certificate of probable cause. The decision of the United States District Court was reversed by the Eighth Circuit on March 16, 1976, and an order was entered vacating respondent's state conviction for the crime of embezzling public funds. The Court of Appeals held ". . . that the confession was given as a result of the plea bargain and was therefore involuntary under . . . all the circumstances."

The petitioner Terrell Don Hutto has been substituted as a party in place of Donald L. Meek, since at the time of the decision of the Court of Appeals, petitioner Hutto, as Commissioner of the Arkansas Department of Correction, had custody of respondent Ross. The petitioner was substituted as a party by Order of the United States District Court for the Western District of Arkansas.

ARGUMENT FOR ALLOWING THE WRIT

WHETHER A STATEMENT MADE SUBSEQUENT TO AN AGREED UPON PLEA BARGAIN, THE CONTINUED VALIDITY OF WHICH IS NOT CONDITIONED UPON THE GIVING OF THE STATEMENT, IS INVOLUNTARY AND INADMISSIBLE UNDER THE TOTALITY OF THE CIRCUMSTANCES?

The petitioner asks this Court to review the decision of the Court of Appeals for the Eighth Circuit since that Court improperly found an implied promise of leniency a finding unsupported by the evidence. The decision that the confession was involuntary as a matter of law is clearly a misinterpretation of this Court's decision.

The petitioner respectfully contends that the decision of the Court of Appeals is based upon policy and not sound constitutional precepts. It is submitted that the Court of Appeals did not properly apply the "totality of circumstances" test to determine voluntariness but merely looked at isolated facts. *Boulden v. Holman,* 394 U.S. 478 (1969). This Court has stated with respect to voluntariness that the test should be the following:

> "Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961).

The petitioner realizes that:

> ". . . 'A confession, in order to be admissible, must be free and voluntary: That is, . . . not . . . obtained by any

direct or implied promises, however slight. . . .' " *Bram v. United States,* 168 U.S. 532, 542-543 (1897).

The Court of Appeals held that since a plea bargain had been reached, an "implied promise of leniency" existed thereby invalidating the voluntariness of the confession ab initio. It is submitted that this interpretation by the Court of Appeals is not supported by law. This Court in *Shotwell Mfg. Co. v. United States,* 371 U.S. 341, 348 (1963) stated that:

". . . [a] coerced confession claim, whether founded on promise of immunity or otherwise, always involves the governmental conduct complained of 'bring about' a confession 'not freely self-determined' "?

Petitioner submits that the Court of Appeals erred in finding that the confession in this case was a product of the plea bargain and, therefore, inadmissible as a violation of the respondent's right against self-incrimination. The right against self-incrimination is subject to being waived under ". . . procedural safeguards effective to secure the privilege against self-incrimination" and ". . . to insure that the statements were truly the product of a free choice." *Miranda v. Arizona,* 384 U.S. 436, 444 (1966). There is no question that respondent was apprised of the required *Miranda* warnings. Further, the confession was made in the office of respondent's counsel and with his counsel present, which negates any claim of overbearing "custodial interrogation" or of an "incommunicado police-dominated atmosphere," situations found undesirable by this Court. *Miranda,* supra, at 455. The record in this case does not contain any evidence that the giving of the confession was a condition precedent to the continued viability of the plea bargain agreement between the respondent and the

prosecuting attorney. Petitioner's counsel at the time that the confession was given testified that petitioner was expressly informed that he did not have to give the confession in order to retain the benefit of the plea bargain. (F.T. 30) The respondent, while under oath, admitted that at the time he gave the statement it was voluntary and that nothing had been promised him in return for the statement. (S.T. 570) The plea bargain in this case was a fait accompli; the recommendation of sentence was not contingent upon respondent making a statement of any kind, and the recommendation would have been made without the statement being given. Respondent's confession was completely voluntary.

In a habeas corpus petition challenging the admissibility of a confession after a properly conducted hearing pursuant to *Jackson v. Denno,* 378 U.S. 368 (1964), ". . . the burden [is] upon [the] petitioner to establish by convincing evidence that the factual determination by the state court was erroneous." *Fugate v. Gaffeney,* 453 F. 2d 362, 364-365 (8th Cir. 1972), cert. denied 409 U.S. 888 (1972). See, also, *LaVallee v. Delle Rose,* 410 U.S. 690 (1973). The respondent in this case testified neither at the state court *Denno* hearing nor at the federal habeas corpus hearing in district court. Federal habeas corpus is civil in nature, and an adverse inference could properly be drawn from the applicant's silence. ". . . [T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano,* —— U.S. ——, p. 10 of slip opinion issued on April 20, 1976, in case No. 74-1187. The petitioner respectfully submits that the Circuit Court of Appeals disregarded established case law in presuming without any evidentiary support that the

confession was given as a result of the plea bargain. The Court of Appeals should have only ". . . [considered] the undisputed facts in the record to ascertain whether the confession resulted from police coercion or the exercise of petitioner's own free will." *Crooker v. California*, 357 U.S. 433, 435 (1958).

The respondent has not only failed to introduce any evidence showing that the State of Arkansas was at fault in the rescission of the plea bargain, but also the Court record can only support the conclusion that the failure to complete the plea bargain was due solely to the actions of the respondent. The record discloses that the initial plea of guilty was not accepted because an employee of the respondent informed the trial judge the respondent was not sane, whereupon, the trial judge refused to accept the guilty plea and sent the respondent to the Arkansas State Hospital for a determination of his competency to enter a plea of guilty. (S.T. 54-55) The respondent was found competent on October 31, 1972, and the finding was filed of record on the 6th day of November, 1972. (S.T. 59) On the 13th day of November, 1972, respondent began filing motions evidencing his withdrawal from the plea bargain: Motions for Subpoena Duces Tecum and Inspection of Record were filed (S.T. 60 and 61); a motion for a Bill of Particulars was filed November 21, 1972 (S.T. 62); Motions for a Hearing on Mental Competency to Stand Trial and For a Change of Venue was filed March 2, 1973 (S.T. 65 and 67); another Motion for Subpoena Duces Tecum was filed April 23, 1973 (S.T. 96, 97); other pretrial motions were filed by the respondent on the 28th day of June, 1973 (S.T. 122 and 124); and a Motion for Continuance was filed August 27, 1973. The petitioner contends that since the failure to conclude the plea bargain was clearly due to the

actions of the respondent, the Court of Appeals improperly relied upon the failure to execute the bargain as relevant to the determination of the admissibility of the confession.

The petitioner respectfully urges this Court to grant certiorari to determine whether a plea bargain negates the admissibility of a subsequent confession freely given after proper warnings required by *Miranda* and where the benefit of the plea bargain was still available even if the defendant withheld any statement. The petitioner submits that it is highly important to the effective administration of justice for this Court to consider this question. A prosecuting attorney might balk at plea negotiations if any material or inculpatory evidence developed subsequent to those negotiations is inadmissible at trial even if the defendant withdraws from the negotiated plea. Prosecuting attorneys may find their hands tied in many important respects: the exclusion of material and inculpatory evidence disclosed in circumstances of meaningful waiver: and the erosion of the totality of circumstances standard with regard to confessions of the defendant.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Appendix

MOBLEY ex rel. ROSS V. MEEK, No. 75-1611

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT; MARCH 16, 1976.

This appeal from a denial of habeas corpus relief by the district court[1] presents the question of whether a statement and confession made by appellant in connection with a plea bargain in a state criminal action was improperly admitted in appellant's trial in violation of his Fifth Amendment privilege against self-incrimination. We hold that the statement was involuntary under applicable federal standards and therefore reverse. The facts are largely undisputed.

Appellant was convicted by a jury of embezzling public funds and sentenced to custody for 21 years. His conviction was affirmed by the Supreme Court of Arkansas. 514 S.W.2d 409 (Ark. 1974).

During the State's case in chief the State offered in evidence a detailed confession made by appellant after a plea bargain had been agreed upon by the state prosecuting attorney and appellant's then retained counsel, Robert Williams, after several conferences. The essence of the plea bargain was that upon a plea of guilty the State would recommend a 15-year sentence with 10 years suspended.

The State record discloses that at the time appellant appeared in court for the purpose of changing his plea from not guilty to guilty, his secretary interrupted the proceedings by volunteering that in her opinion appellant

[1]The Honorable Paul X. Williams, Chief Judge, Western District of Arkansas. Opinion reported at 394 F. Supp. 1219 (W.D. Ark. 1975).

was too ill to be aware of the consequences of his action. She also produced a letter from a doctor concerning appellant's condition. After further inquiry the court decided not to proceed and made arrangements for a later hearing with respect to appellant's mental competency.

Subsequently appellant was found competent to stand trial. He proceeded to trial with other retained counsel and raised the defense of insanity at the time of the commission of the alleged offenses of embezzlement. During the prosecution's case in chief the disputed confession was offered in evidence. After conducting a *Jackson v. Denno* hearing, the state trial court found the statement made by appellant was voluntary and admitted the same. After the Arkansas Supreme Court affirmed, certiorari was sought and denied by the United States Supreme Court. The petition for habeas corpus was then filed in district court, and the court conducted a hearing which included the taking of the testimony of appellant's former counsel, Robert Williams. The district court found that appellant was given the appropriate *Miranda* warnings and found that appellant "has proved no violation of any rights he has under the constitution and laws * * * of the United States." 394 F. Supp. at 1223.

The appellant's principal contention is that he was induced to make the statement (confession) as a result of a plea bargain made by his then counsel of record. He urges that the fact that at a subsequent hearing he failed to withdraw his plea of not guilty and exercised his right to stand trial "completely obliterates the voluntariness of the confession and thereby makes it inadmissible at the subsequent trial." Appellee, on the other hand, contends that appellant's own words which appeared in the confession given under oath acknowledge that he had not been promised

anything by anyone for making the statement and that the same was a free and voluntary statement. The appearance of these words in the confession is not disputed. But that is not the end of the problem.

It is undisputed that a plea bargain had been made by counsel and that appellant, after being fully apprised of the terms thereof, agreed to enter a plea of guilty. Thereafter the prosecution requested through appellant's attorney that appellant give a statement as to what actually occurred and how he took the money and used it.[2] The confession was given by appellant in the presence of his counsel and other witnesses.

Appellant's counsel, Williams, testified at both the state *Jackson v. Denno,* hearing and in the federal district court hearing that he would not have advised appellant to make a statement or give a confession if there had not been a plea bargain agreement. It was the view of the Arkansas court and the district court that counsel's hindsight did not affect the voluntariness of the confession. *See* 514 S.W.2d at 411; 394 F. Supp. at 1222. We are not so persuaded.

Conceding arguendo that the confession was not an express precondition of the plea bargain, it nevertheless was made in connection with an offer to plead guilty and after a bargain had been agreed upon. It is obvious that no such confession would have been made at the request of the

[2]Excerpt of the testimony before the federal district court by appellant's attorney, Williams, is as follows:

Q. Did the prosecuting attorney insist on this statement?

A. If you are using the word "insist" in just its common context, yes. He told me several times that he wanted this statement. He insisted to me. If you are talking about a more technical way of thinking about the word "insist" that he refused to go ahead unless it was given, no.

prosecution but for the plea bargain. It became a part and parcel thereof.

In a recent case we recognized the importance of confidentiality in plea bargaining.

> Plea bargaining has been recognized as an essential component of the administration of justice. "Properly administered, it is to be encouraged." *Santobello v. New York,* 404 U.S. 257 (1971). If such a policy is to be fostered, it is essential that plea negotiations remain confidential to the parties if they are unsuccessful. Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence. *United States v. Verdoorn,* No. 75-1644 (8th Cir., Jan. 13, 1975), Slip Opinion at 7.

Further, plea bargaining and the inadmissibility of offers of pleas and related statements have been sanctioned by recent amendments to the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 11(e)(6) (effective August 1, 1975) provides:

> *Inadmissibility of Pleas, Offers of Pleas, and Related Statements.* Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

The Federal Rules of Criminal Procedure, of course, are not binding on the states.[3] The issue here is the voluntariness of appellant's confession under federal standards. *Malloy v. Hogan,* 378 U.S. 1 (1963); *Bram v. United States,* 168 U.S. 532, 542 (1897); *Hunter v. Swenson,* 442 F. 2d 625, 630 (8th Cir. 1971).

> Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any *direct or implied promises, however slight,* nor by the exertion of any improper influence . . ."

Malloy v. Hogan, supra, 378 U.S. at 7 (emphasis added).

Similarly, "evidence of guilt induced from a person under a governmental promise of immunity" must be excluded under the self-incrimination clause. *Shotwell Mfg. Co. v. United States,* 371 U.S. 341, 347 (1963). The issue of voluntariness "necessarily turns on the 'totality of the circumstances.' " *Boulden v. Holman,* 394 U.S. 478, 480 (1969). *See also Haynes v. United States,* 373 U.S. 503, 512 (1963).

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[3] See ABA Standards Relating to Pleas of Guilty, Sections 2.2, 3.4 (Approved Draft 1968).

We recognize that the state court's findings are entitled to a presumption of correctness with the burden on appellant to establish by convincing evidence that the factual determination by the state court was erronous. *LaVallee v. Delle Rose,* 410 U.S. 690 (1973); 28 U.S.C. §2254. The district court having held a hearing, its findings must prevail unless found to be clearly erroneous. Fed. R. Civ. P. 52. We must determine whether appellant's confession "was involuntary and inadmissible as a matter of law." *Swenson v. Stidham,* 409 U.S. 224, 231 (1972). There is little dispute as to the basic facts. Our concern is with the failure of the state and district courts to recognize that the confession was given as a result of a plea bargain and was therefore involuntary under all the circumstances. It is our conclusion that, since the plea bargain was not executed, the confession was involuntary and inadmissible. *Cf. Hunter v. Swenson,* 504 F. 2d 1104 (8th Cir. 1974).

The judgment of the district court denying the petition for writ of habeas corpus is vacated and this cause is remanded for entry of orders consistent with this opinion. The State should be allowed a reasonable time in which to retry appellant if it desires to do so.